Supreme Court, U.S.
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No. 92-1592

In The

Supreme Court of the United States

October Term, 1992

IOWA COAL MINING COMPANY, INC.;
STAR COAL MINING COMPANY, INC.;
and JIM HUYSER,

Petitioners,

v.

THE BOARD OF SUPERVISORS OF MONROE COUNTY, IOWA; and MONROE COUNTY, IOWA,

Respondents,

IDF ACQUISITION CORP.,

Intervenor,

FIRST STATE INSURANCE COMPANY,

Amicus Curiae.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENTS' BRIEF IN OPPOSITION

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CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional Questions I and II framed by the Petitioners for review appear to be a broad-based, facial Constitutional attack upon the validity of the zoning ordinance.[1] This also appears to be the issue raised in the Petition filed in the Iowa District Court. If this is the Petitioners' contention, it has failed. The Iowa Supreme Court gave the Petitioners the benefit of the doubt and evaluated their attack under the *ad hoc* three-factor approach of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978) or: (1) the economic impact of the regulation on the Claimants' property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action.

The following Iowa statutes and provisions of the zoning ordinance factor into this Constitutional analysis:

1. Section 335.5, *Iowa Code*, 1993 (formerly Section 358A.5, *Iowa Code*).

> "The regulations shall be made in accordance with a comprehensive plan and designed to preserve the availability of agricultural land; to consider the protection of soil from wind and water erosion; to encourage efficient urban development patterns; to lessen congestion in the street or highway; to secure safety from fire,

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[1] In a facial Constitutional attack, the Petitioner has the burden of proof to negate all possible legitimate applications of the law. This is a heavy burden. *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 502, 107 S.Ct. 1232, 1250, 94 L.Ed.2d 472 (1987).

flood, panic, and other dangers; to protect health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to promote the conservation of energy resources; to promote reasonable access to solar energy; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. However, provisions of this section relating to the objectives of energy conservation and access to solar energy shall not be construed as voiding any zoning regulation existing on July 1, 1981, or to require zoning in a county that did not have zoning prior to July 1, 1981.

Such regulations shall be made with reasonable consideration, among other things, as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such county."

2. Section 2, Ordinance 6. (Pet. App. 93a-94a).

"The purpose of this Ordinance is to promote public health, safety, comfort and general welfare; to conserve and protect property values; to encourage the most appropriate use of land through orderly development to conserve and protect our natural resources; to facilitate adequate but economical provisions for public improvements; and to protect private property rights, all in accordance with and as permitted by the provisions of Chapter 358A. Code of Iowa (1987)."

3. Section 6, Subd. 4, Ordinance 6. (Pet. App. 123a).

> "Intent: The A-1 Agricultural District is intended and designed to serve the agricultural community and protect prime agricultural land from encroachment of urban land uses. This district is not intended to be used for non-farm residential developments, governmental facilities, or commercial businesses."

(Principal permitted uses were listed as farms; breeding of mink, chinchilla, etc.; truck gardens, orchards, and wholesale nurseries; forest and wildlife preserves; sod farms; single family homes on existing parcels of less than 15 acres; and public parks. Conditional uses were listed as livestock and poultry feedlots; commercial microwave, radio and television towers; public buildings; churches; cemeteries; temporary facilities for music, sports, commercial exhibitions and carnival events; stables; and mining.)

4. Section 6, Subd. 5, Ordinance 6. (Pet. App. 127a).

> "Intent: The A-2 Agricultural district is intended and designed to provide for those activities which are strongly interrelated with agricultural uses and must therefore be located in agricultural areas."

(Principal permitted uses were listed as any principal use listed in A-1; stables, riding academies, and structures for housing animals or fowl; grain elevators; public buildings; livestock feed and grain sales; animal hospitals and veterinary clinics; and seed sales. Conditional uses were listed as anhydrous ammonia storage and pumping

facilities; fertilizer and agricultural chemicals; commercial feedlots; commercial microwave, radio, and television towers; churches; cemeteries; temporary facilities for music, sports, commercial exhibitions, and carnival events; temporary asphalt and concrete mixing plants; private non-commercial landing fields; golf courses; salvage yards; and mining.)

5. Section 455B.302, *Iowa Code*, 1993, effective July 1, 1987. (Requires counties to establish and operate waste reduction programs and regulate and inspect private sanitary landfills.)

6. Section 455B.301A, *Iowa Code*, 1993, effective July 1, 1988. (Establishes a hierarchy of solid waste disposal, with landfills the least desirable.)

7. Section 455B.306, *Iowa Code*, 1993, effective July 1, 1988. (Requires detailed comprehensive plan of disposal of all waste and its impact upon the environment.)

8. Section 455E.10, *Iowa Code*, 1993, effective July 1, 1988. (Requires counties to adopt and implement ground water protection policies.)

9. Section 455D.3, *Iowa Code*, 1993, effective July 1, 1989. (Requires counties to reduce waste at its source with a goal of 25% reduction by July 1, 1994, and 50% by July 1, 2000.)

STATEMENT OF THE CASE

Petitioners ask that this Court retry the facts found by the Iowa Supreme Court.[2] This Court generally will not re-examine a state court's findings and conclusions of law. *Grayson v. Harris*, 267 U.S. 352, 358, 45 S.Ct. 317, 319, 69 L.Ed. 652 (1925); and *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160, 73 S.Ct. 204, 206, 97 L.Ed. 168 (1952). The Iowa Supreme Court decision turned upon the Court's analysis of the particular facts involved; that analysis is generally not reviewable upon certiorari. *Texas v. Mead*, 465 U.S. 1041, 1042-43, 104 S.Ct. 1318, 1319-20, 79 L.Ed.2d 714 (1984).

Petitioners continually cite facts as found by the Trial Court.[3] Nowhere do they cite the facts as found by the Iowa Supreme Court. For this reason, the Respondents cannot accept Petitioners' Statement of the Case.

Sometime in 1987, a member of the Monroe County Board of Supervisors proposed that zoning should be considered. Concerns were expressed over the proliferation of junk yards, feedlots, and other uses at random places within the County. After much discussion, on October 27, 1987, the Area XIV Regional Planning Commission was retained to make recommendations concerning a Comprehensive Zoning Ordinance. The Regional

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[2] Pet. App. 8a and 494 N.W.2d at 668: "The existence of a Constitutional issue requires us to review *de novo* the evidence bearing on that claim."

[3] For example, see Petition for Certiorari, at pages 8, 9, 10, 11, 12, 15, 16, 17, 20, 21, and 25. The overwhelming weight of the evidence introduced at trial established the facts as found by the Iowa Supreme Court.

Planning Commission had previously undertaken several studies of counties in its area, of which Monroe County was one.

Monroe County comprises 278,400 acres or 435 square miles. In 1980 its population was 9,209, with 4,165 people living in the unincorporated area. Its total labor force was approximately 4,074. 659 people were employed in agriculture; 15 in mining; 217 in construction; 921 in manufacturing; 158 in transportation; 172 in wholesale trade; 593 in retail trade; 81 in finance; 855 in services; and 125 in government. It had approximately 3,510 houses county-wide, with 1,732 in the rural area. Medium value of its dwellings was $26,700. These statistics have not appreciably changed since 1980.

The County's land was found to be a rolling demography, with approximately 20% in timber. 1.06% of the County was incorporated; 23.64% was high-quality agricultural land; 54.76% was low-quality agricultural land; 1.14% comprised public facilities; 15.96% was in private, open spaces; .02% was commercial; .92% was industrial; .23% was residential; and 2.25% was devoted to transportation.

The development policies of the County were stated to be: (1) preserve high-quality agricultural land, because that will be the primary industry; (2) future residential/commercial/industrial development should be encouraged to locate in areas where public services are available; (3) existing lots and structures should be filled; and (4) to make the most of existing transportation routes, commercial and industrial development should be encouraged to locate on adequate paved roads. These

recommendations also noted that the area had problems with shortages of job opportunities for college graduates, out-migration of the young, an aging population, a need for elderly housing, and a need for rehabilitation of existing housing. Agriculture and manufacturing were found to be the County's primary industries.

Iowa cities and counties were required in 1972 to establish solid waste landfills by 1975. There were no environmental requirements. Generally, each municipality established its own landfill. National concerns developed in the 1980s over the environment and contamination of the ground water. This led to the adoption of federal legislation requiring state regulation of pollutants and contaminants. In Iowa, this resulted in the enactment of the *Ground Water Protection Act* of 1987 (now Section 455B.301, *et seq.*, *Iowa Code*, 1993), placing expensive requirements on landfills. In subsequent years, small landfills would be required to incur this expense if they wished to remain open. Sections 455B.305 and 455B.306, *Iowa Code*, 1993. Counties were encouraged to consolidate their landfills, because the cost to meet these new requirements would be less per ton of solid waste if the amount of waste deposited was increased.

As part of this legislation, counties were required to either operate or regulate landfills. Section 455B.302, *Iowa Code*, 1993. Monroe County, on September 17, 1987, responded to this state mandate by adoption of Ordinance No. 4, which provided for regulation of private landfills, including the posting of a $1,000,000 bond.

(Resp. App. 1 and 5).[4] Monroe County, in conjunction with adjacent counties, participated in several public meetings to discuss a joint response to this state mandate. The County was part of a state-financed study of regional waste-disposal consolidation conducted by Clapsaddle & Associates, Inc.[5] Zoning was considered a desirable "tool" to aid in this regulation, as well as providing guidance for other land uses.

It is against this backdrop that Petitioners decided on July 1, 1987, to "convert" a planned coal mine, Star 14, to a solid waste landfill, to be a "central depository" to "take over" the governmental function of waste disposal. Section 331.441(2)(b)(3), *Iowa Code*, 1993.

Petitioners commenced their exploratory drilling for Star 14, needed to file their application for a strip mining permit for coal, on April 22, 1986. (Resp. App. 15). Leases to extract only coal were obtained in May of 1986. (Resp. App. 15). The application for a permit to strip mine for coal was submitted to the State of Iowa on April 17, 1987. (Resp. App. 15). On July 1, 1987, it was suggested to Petitioners that because of the Iowa Ground Water Act, they may want to consider establishing a regional landfill. Amendments to the original coal mining leases were

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[4] Petitioners ignore the mandate of this ordinance, as well as the requirements placed upon Monroe County by Section 455B.302 and Chapter 455D, *Iowa Code*, 1993.

[5] Monroe County did participate in public meetings with other cities and counties to discuss the possibility of establishing a landfill for all at a central location. Everyone who desired was permitted to address their elected representatives. How exercise of this First Amendment guarantee can be transformed into a "vicious attack" is unknown. (Petition, p. 9.)

obtained, at no extra cost, in August of 1987 to permit solid waste landfilling. (Resp. App. 15 and 22-27). Petitioners, with the knowledge that a zoning ordinance was under study, commenced drafting their application for a landfill permit on November 2, 1987. (Resp. App. 17). This application was submitted to the State of Iowa on January 19, 1988. (Resp. App. 17). As pointed out by the Iowa Supreme Court's factual findings, Petitioners' efforts to pursue their landfill concept paralleled the County's public zoning proceedings. (Pet. App. 15a and 494 N.W.2d at 671.)

The landfill permit issued to Petitioners several months after their application was filed with the State of Iowa and was limited to municipal solid waste and coal combustion ash from a six-county area which could be expanded, upon application, review, and state approval, to a twenty-county area. It was specifically issued subject to local regulations. (Resp. App. 29).[6] Proper representatives from each of the counties targeted by Petitioners testified at trial that they would not have used Star 14 for their solid waste landfill.[7] At trial, evidence was introduced that the property comprising Star 14 was being used for farming and grazing cattle.

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[6] Again, Petitioners continually assert, erroneously, that there were no other regulations applicable and that they only needed a permit issued by the Iowa Department of Natural Resources. (Petition, pp. 5, 6, 17 n.3, and 20 n. 4).

[7] Petitioners assert, contrary to the evidence and the facts found by the Iowa Supreme Court, that it had customers as of May 1988 to landfill 1,000 tons of waste per day.

Based upon the evidence before the Trial Court, the Iowa Supreme Court found that it was quite clear that the coal leases for Star 14 were acquired in anticipation of strip-mining, and not solid waste disposa1.[8] It found the economic viability of mining Star 14 was only diminished because it had substantial shallow deposits that could be profitably mined. It found that the nature of the regulation of this zoning ordinance was to regulate the health and welfare of the community. It further found that the investment-backed expectations of the Petitioners were for strip-mining coal, and their resources had been committed for this purpose. Lastly, the Iowa Supreme Court found that this ordinance was a reasonable regulation of land use within the county and that Petitioners' claimed destruction of all beneficial use was a result of market conditions for coal and not the zoning regulations. (Pet. App. 14a-16a and 494 N.W.2d at 671). Market conditions affect all businesses, not just the Petitioners'.

In commenting upon the ordinance, the Iowa Supreme Court found that landfilling was placed in the I-2 district because it presented environmental, safety, and road maintenance concerns better accommodated in

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[8] Petitioners continue to claim, contrary to the evidence and the Iowa Supreme Court's findings, that they had spent over $600,000 in preparation to landfill (Petition, p. 6); spent over $300,000 in development of landfilling and royalties (Petition, p. 8); and expended thousands of man hours and hundreds of thousands of dollars in acquiring leasehold rights and preparing Star 14 for landfilling (Petition, p. 24). Not only are these statements inconsistent, there simply is no credible evidence to support these assertions, as found by the Iowa Supreme Court.

a heavy industrial district.[9] (Pet. App. 5a and 494 N.W.2d at 667). It found the ordinance "comprehensive in its scope, uniform in its application to properties having similar qualities and location, and advances community needs ahead of private concerns." (Pet. App. 11a and 494 N.W.2d at 669).

SUMMARY OF ARGUMENT

Ordinance No. 6, the zoning ordinance, is a regulatory ordinance of general application, county-wide. It does not place restrictions on Petitioners' property for the benefit of another specific property owner. Principal uses permitted in one zoning district are prohibited or incorporated in other districts resulting in a rational use of land that promotes the general welfare. Beneficial uses are accorded all land in each district. The three cases relied upon by Petitioners, *Lucas v. South Carolina Coastal Council*, 550 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); and *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991), involve laws that prohibit all use of land for which a substantial investment had been made in furtherance of a specific purpose without knowledge that

[9] Petitioners allege, at page 10 of their Petition for Writ of Certiorari, that only a single change was made in the text of the zoning ordinance. However, the trial record discloses that numerous changes were made over several drafts and after much consideration with public input.

a prohibitory law was contemplated. *Lucas* and *Whitney* found a taking under these unusual circumstances, while *Keystone* did not. All three recognized that reasonable restrictions on principal uses found in zoning ordinances, as with the case at bar, do not constitute a taking under the Fifth Amendment. Since no basis for the grant of certiorari has been presented, it should be denied.

REASONS TO DENY THE PETITION

I. PETITIONERS HAVE FAILED TO ESTABLISH THAT THE ZONING ORDINANCE ON ITS FACE EFFECTS A TAKING OR IS A CATEGORICAL TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

Petitioners repeatedly resort to the ruling of the Trial Court to state the facts in their argument. Because Constitutional issues were involved, the Iowa Supreme Court did not accept the Trial Court's fact findings. It reviewed the evidence *de novo* and substituted its own findings of fact, which were considerably different than the Trial Court's.[10] The sole basis for the Petitioners' claim is that they could not use their newly-acquired waste-disposal leaseholds in the manner they desired, regardless of the detrimental impact on surrounding property. Adjacent property had not been put to this use. If Petitioners' contention is valid, it would potentially subject 90% of Monroe County to solid waste landfilling, because 90% of

[10] Ibid 2.

this County is agriculture and zoned A-1 or A-2. Petitioners' contention is the same as saying one should be allowed to construct and operate a cement plant, which is very profitable, in the middle of a residential neighborhood regardless of the impact on surrounding property. As stated by this Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978):

> " . . . the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."

Exclusion of uses from defined areas or districts does promote the general welfare and is not a taking. *Euclid v. Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (exclusion of industrial use not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (prohibit use as a brick yard, not a taking. "To so hold would preclude development and fix a city forever in its primitive conditions." *Id.* at 410); and *Goldblatt v. Hemstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (mining prohibition).

Petitioners would have this Court decree that each use to which property can be put is a "stick" in the "bundle of rights" comprising the fee title to property. Petitioners then theorize that if one use (stick) is prohibited, compensation is due. Such a holding would reek havoc with initial zoning or rezoning across the nation.

This proposition was rejected by this Court in *Penn Central*, 438 U.S. at 130, 98 S.Ct. at 2662 ("Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated) and *Keystone*, 480 U.S. at 498, 107 S.Ct. at 1248 ("Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property").

Lucas did not reverse these holdings. *Lucas* involved a South Carolina law that prohibited construction of any habitable structure on beach-front property. Prior to the enactment of this law, adjacent property had been so developed. Lucas had purchased two beach-front lots, without knowledge that this law was contemplated, two years before its passage. He owned the lots in fee simple and it was this title that this Court evaluated. 550 U.S. at ___, 112 S.Ct. at 2894, n. 7.

The state of South Carolina relied upon the legislative pronouncement that new construction threatened a public resource. 550 U.S. at ___, 112 S.Ct. at 2890. The Trial Court had found that at the time of purchase there were no restrictions and that the total ban on habitable construction rendered the lots valueless. 550 U.S. at ___, 112 S.Ct. at 2890. These findings were not questioned in the state's resistance to the petition for certiorari and were therefore held binding, even though the state later contended they were erroneous. 550 U.S. at ___, 112 S.Ct. at 2896, n. 9. In *Lucas* all of the "sticks" in the "bundle of rights" had been taken (any building, not just one for a specific use). That is not the situation with the case at bar.

Lucas further held that investment-backed expectations are to be evaluated in light of an owner's knowledge that restrictions may be placed upon his property under principles that underlie "the State's law of property." 550 U.S. at ___, 112 S.Ct. at 2894, n. 7. In this case, Petitioners' mining leases pre-dated its landfill leases by more than a year. Petitioners' investment was for strip-mining which remained a conditional use. They obtained solid waste landfilling permission from the fee owners, at no extra cost, in August of 1987. Petitioners knew when they started preparation of their application for a solid waste landfill permit in October of 1987, that zoning was contemplated. It was not until January 15, 1988, long after the planning and zoning process was underway, that their application was filed with the State of Iowa.

Under the property law of Iowa, one who expends money on property improvements knowing of a zoning study and possible adoption of restrictions, proceeds at his peril. *Huff v. City of Des Moines*, 244 Iowa 89, 94, 56 N.W.2d 54, 57 (1952); *Brackett v. City of Des Moines*, 246 Iowa 249, 261, 67 N.W.2d 542, 548 (1954); and *Deardorf v. Bd. of Adj.*, 254 Iowa 380, 389-90, 118 N.W.2d 78, 83 (1962). The petition should be denied.

II. SINCE THE ZONING ORDINANCE DID NOT PROHIBIT ALL BENEFICIAL USE OF THE PROPERTY, A TAKING HAS NOT OCCURRED.

Petitioners, by separate document more than one year after the original coal leases, acquired permission to put Star 14 to another use. They now have construed each use to be a "stick" in the property's "bundle of rights."

They then add the "sticks" together and maintain that these two "sticks" are now the "bundle of rights" comprising this property regardless of the many other permitted and conditional uses allowed under the zoning ordinance.

Petitioners' argument does not here end. They theorize that since late 1987 they had a business plan to replace the coal strip mined with solid waste, any prohibition of this joint use by a zoning ordinance constitutes a taking compensable under the Fifth Amendment. They refused to engage in the beneficial use of strip mining. This is tantamount to a contention that a Fifth Amendment taking occurs when a commercial feedlot is prohibited from raising, slaughtering, and processing livestock from a single location, thereby reducing its yearly profits of $2,000,000 to $1,000,000. This simply is a perversion of the taking jurisprudence.

Petitioners planned only limited coal mining under their joint use plan. Petitioners' evidence at trial was that Star 14 could landfill 1,000 ton of waste per day, 260 days per year, or 260,000 tons per year. 10 tons of waste can be deposited for every ton of coal extracted. Thus, only 26,000 ton of coal would be mined each year. However, the Iowa Supreme Court found that the shallow deposits of coal on Star 14 were profitable deposits that could have been strip mined. (Pet. App. 14a and 494 N.W.2d at 671.)

Another hotly contested issue at trial was the economic viability of Petitioners' new business because of losses associated with its old coal mining business. Its financial statement of assets was questionable. It had experienced a loss of $1.6 million in a failed underground

mining venture; $900,000 in faulty machine repair; $1.2 million when a supplier reduced the price of coal received; and $300,000 from faulty oil. These losses severely undermined Petitioners' ability to remain in business.

Petitioners' application to re-zone the Star 14 property to I-2 was not involved in the ruling of the Trial Court or the decision of the Iowa Supreme Court. The trial record establishes that this application was processed in accordance with the zoning ordinance, which included a hearing and physical inspection of the area by the members of the Plan and Zoning Commission. The request was denied because an I-2 (heavy industrial) district was not compatible with adjacent property zoned A-1 and A-2.

Lastly, the measure of damages, although not reached by the Iowa Supreme Court, was hotly contested. In Iowa, taking damages are the difference between the property value before taking and after; not a speculative assessment of potential profits *ad infinitum*.[11]

The Iowa Supreme Court, giving Petitioners the benefit of the doubt, evaluated their claim under the *ad hoc* approach involving the three factors of (1) economic

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[11] *Thompson v. City of Osage*, 421 N.W.2d 529 (Iowa 1988). If the land was actually being used as claimed by Petitioners, that use could continue as a nonconforming use under the zoning ordinance. Sec. 9, Ordinance 6. (Pet. App. 159a-162a). If a large investment had been made before consideration of zoning was known, that use could have continued under Iowa law as a "vested right." *Bd. of Supr. of Scott County v. Paaske*, 250 Iowa 1293, 1298-99, 98 N.W.2d 827, 831 (1959). Petitioners did not make either of these claims.

impact of the regulation on the Claimant's property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659; 57 L.Ed.2d 631, 648 (1978). (Pet. App. 13a and 494 N.W.2d at 670). Petitioners' claim fails all three tests. The Petition should be denied.

III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE IOWA SUPREME COURT AND DECISIONS OF THE UNITED STATES SUPREME COURT OR THE FEDERAL CIRCUIT COURT OF APPEALS.

A. There Is No Conflict With This Court's Decision In *Lucas* And *Keystone*.

The Iowa Supreme Court decided the case *de novo* based upon the voluminous record before it.[12] The facts as found by the Iowa Supreme Court were the overwhelming facts as disclosed by the evidence. Petitioners refuse to acknowledge the Iowa Supreme Court's unanimous panel's findings, and instead dwell upon the district judge's unsupported findings.[13] There is no conflict between the decision of the Iowa Supreme Court and this Court's decisions in *Lucas and Keystone*.[14]

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[12] The record on appeal to the Iowa Supreme Court consisted of an Appendix of 4409 pages and 228 exhibits.

[13] The case was initially heard and decided, unanimously, by a panel of five justices. However, Petitioners' Petition for rehearing was considered and denied by all nine Justices of the Iowa Supreme Court. (Pet. App. 18a).

[14] Discussed at pages 14-15 of Respondents' Brief in Opposition.

B. The Decision Of The Iowa Supreme Court Does Not Conflict With The Federal Circuit's *Whitney Benefits* Decision.

Petitioners cite only for this Court the Federal Circuit's decision reported at 926 F.2d 1169 (Fed. Cir. 1991). The prior decision of *Whitney Benefits, Inc. v. United States* reported at 752 F.2d 1554 (Fed. Cir. 1985) is also applicable. These cases involved the application of the Surface Mining Control and Reclamation Act (SMCRA) as it was directed to specific property in Wyoming. The principal issue was whether or not the government could, under the Fifth Amendment, require a property owner to accept other coal deposits owned by the government in lieu of money damages as just compensation. In the first *Whitney Benefits* case, the Federal Circuit held that the SMCRA effected an actual taking (physical invasion) of these coal reserves for which the government wanted to force an exchange of other coal reserves on the property owner as "just compensation." 752 F.2d at 1559. It was held that the government could not force an exchange as just compensation, especially when Congress had appropriated money for its payment. The case was returned to the Court of Claims.

In the second *Whitney* case, the Federal Circuit first held that it would not decide the facts *de novo*, but would apply the clearly erroneous rule to the Court of Claims' findings. Similarly, the fact finding of the Iowa Supreme Court cannot be disturbed.

Under the clearly erroneous rule, the Federal Circuit noted that *Whitney Benefits* was a *fact specific* case involving only that company's property. 926 F.2d at 1171. Whitney was the owner of the fee. 752 F.2d at 1555 and

926 F.2d at 1174. Wyoming's property law recognized separate mineral and surface rights. 926 F.2d at 1174. Iowa law does not recognize a separate estate in property for solid waste landfilling. The Federal Circuit noted that the Congressional debate specifically targeted this coal reserve for a taking. 926 F.2d 1173. Thereafter, under the clearly erroneous rule, the Federal Circuit approved the Claims Court's finding that Whitney had purchased the property for its coal deposits; had a pre-SMCRA investment in excess of $1,000,000 directed toward coal mining, which was thwarted; and the SMCRA had either taken this property or completely destroyed the only value it had. 926 F.2d at 1174 and 1177. *Whitney* is easily distinguishable from the facts of this case, as found by the Iowa Supreme Court. Since *Whitney* does not conflict with the case at bar, certiorari should be denied.

CONCLUSION

The facts as found by the Iowa Supreme Court establish that the zoning ordinance at issue was comprehensive in scope, uniform in its application to properties having similar qualities and location, and advances community needs ahead of private concerns. It is not facially unconstitutional, nor does it provide for a categorical taking of Petitioners' property. It did not destroy all beneficial use of the property. Petitioners, under Iowa property law, did not have investment-backed expectations of solid waste landfilling. Since no grounds to grant

the application for a writ of certiorari have been established, it should be denied.

Respectfully submitted,

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ORDINANCE # 4

AN ORDINANCE establishing requirements for the operation of Landfills within the County and providing enforcement mechanisms.

SECTION #1: PURPOSE

This Ordinance implements the County's responsibility to consider groundwater protection policies in its programs as mandated by Iowa Code Section 455E.10(1); adopts regulatory policies for groundwater protection as authorized by Iowa Code Section 455E.10(2); requires all prospective operators of solid waste disposal facilities to apply for and acquire a Solid Waste Disposal Permit from the County upon a proper showing of need, public hearing within the County on environmental impact, and payment of permit fees; requires all operators to post responsible financial assurance for the lawful, conscientious and reliable operation of a disposal facility; and provides for revocation of permits and other civil penalties consistent with the home rule authority and police power of the County and Iowa Code Section 331.302(15).

SECTION#2: DEFINITIONS

A. "County" means Monroe County, Iowa.

B. "Law" means all Federal, State, and Local statutes, administrative rules, ordinances, Court rulings, and agency rulings which apply to a given situation.

C. "Operator" means a person or corporation operating a disposal facility.

D. "Disposal Facility" means a sanitary landfill where solid waste is buried between layers of earth.

E. "Groundwater" means any water defined in Iowa Code Section 455B.171, which occurs beneath the surface of the earth on a saturated geological formation of rocks or soil.

F. "Nuisance" means those activities defined in Iowa Code Sections 657.2(1), (2) and/or (4).

SECTION #3: POLICY

The protection of the health, safety, and welfare of citizens in Monroe County and the protection of the environment require the safe, sanitary, and reasonable disposal of solid wastes. An effective and efficient solid waste disposal program protects the environment and the public, and provides the most practical and beneficial use of the material and energy values of solid waste. While the continuing necessity for the existence of landfills to meet the needs of the people is apparent, alternative methods of managing solid waste for all persons are needed and methods of managing the solid waste of all persons is the responsibility of all persons and their elected representatives, including representatives of Monroe County.

Persons in Monroe County have a right to be protected from unnecessary, unsafe, and/or unreasonable disposal of solid waste which affects them and their environment, and the right to be free from nuisance created by solid waste and/or its disposal. To the end that

solid waste and its disposal is everyone's problem, persons in Monroe County have a right to address the relevant issues in a local, public forum and through their representatives and through the County's inherent police power, the right to require, implement, and enforce reasonable regulations of solid waste and its disposal.

SECTION #4: REQUIREMENTS FOR SOLID WASTE DISPOSAL FACILITY

A. It shall be unlawful for any private or public person, corporation, or agency to dump or deposit or permit the dumping or depositing of any solid waste at any place in the County other than a disposal facility holding a permit issued by the County's Board of Supervisors. (However, this Section shall not prohibit a private person or a public body from dumping or depositing solid waste resulting from its own residential, farming, manufacturing, mining, or commercial activities on land owned or leased by it, if the action does not violate any other Law. This Section specifically prohibits the dumping or depositing of solid waste at any landfill which does not hold the requisite County permit.)

B. An operator of a proposed or existing disposal facility may apply for a permit by completing all of the following:

1. A written request for a permit must be filed with the County Board of Supervisors and the application must include:

a. The names, addresses, and telephone numbers of the operator (if a corporation, the information must include the names of its officers), and all persons assisting in the preparation of the application (engineers, geologists, etc.).

b. The exact legal description of the proposed location of the disposal facility.

c. The detailed plans for transportation, transfer, loading and unloading, processing, and burial of solid waste (including plans for use of public and private rights-of-way; traffic control; dust control; disease control; and visibility control).

d. A detailed study and detailed projections regarding the impact of the facility and its operation on groundwater resources.

e. Detailed projections concerning the daily volume in tons of solid waste; daily traffic count; and duration of facility use.

f. Detailed plans for maintenance and monitoring of the facility, including monitoring through ground wells for presence of leachate.

g. Detailed plans for closure and post-closure maintenance and monitoring.

2. Appearance at a public hearing scheduled and conducted by the County to receive

input from, and address questions from, persons and agencies regarding the application for permit.

3. Posting of a $1,000,000.00 irrevocable, non-dischargeable bond for 30 years duration to assure the performance by the operator of proper operation, maintenance, monitoring, closure and postclosure maintenance and monitoring responsibilities for the period of operation and for 30 years after closure.

4. Payment to the County of a permit fee of $100.00 and additional, periodic fees as follows:

   a. The operator shall document in writing and pay $2.00 for each ton of solid waste (measured as required in Iowa Administrative Code Section 567 – 109.4 (455B)(2) in excess of 25 tons per day.

   b. Payments shall be made on a quarterly basis due ten days after the close of each calendar quarter.

   c. Permit fees unpaid when due shall draw interest and penalty at one and one-half percent per month until paid.

   d. Permit fees unpaid when due shall result in immediate revocation of the permit.

5. The County Board of Supervisors shall schedule a public hearing before a joint meeting of the Board, the County Board of

Health, and the County Conservation Board, on each permit application.

a. Notice of the hearing shall be published as required in Iowa Code Section 331.305.

b. At the hearing, the Chairman of the Board of Supervisors shall preside.

c. The applicant for the permit shall address the hearing and set forth the proposal for a Solid Waste Disposal Permit.

d. The County Board of Health shall make a presentation regarding its findings from any study conducted, investigation undertaken, or other relevant matters, concerning the proposed operation of a disposal facility.

e. The County Conservation Board shall present its findings from any study conducted, or investigation undertaken and any other relevant findings or information concerning the proposed operation of a disposal facility.

f. Input, if any shall be received from the public.

g. At the conclusion of the hearing or at a future meeting, the Board of Supervisors shall consider the application and shall make specific findings as to the need for the facility; the impact of the operation of the facility on the County's infrastructure and environment, groundwater

resources, and the public; the information submitted by the County Health Board and Conservation Board; and the general qualifications of the specific proposal presented and the specific operator nominated. The Board shall make a decision whether to grant the permit requested, deny the application, or grant the permit on specified conditions.

h. The County Board of Supervisors shall notify the applicant in writing of its decision and the basis therefor.

SECTION #5: OPERATION OF FACILITY

A. All trucks, railcars, or other transportation vehicles transporting solid waste to the facility and traveling within the County must be tarped or fully enclosed at all times, except for the specific loading and unloading of the transportation vehicle at a transfer station or at the disposal facility; and any such loading and unloading activity shall not result in the exposure of solid waste for more than a 12-hour period.

B. It shall be unlawful for any person who is not specifically vested with the responsibility of loading, unloading, or monitoring of solid waste within the County to rummage through, pilfer, salvage, or otherwise invade, tamper with, or have voluntary contact with, solid waste being transported to, being dumped or deposited in a disposal facility, or located within such facility. However, it shall not be unlawful for persons to

come in contact with solid waste when cleaning a transfer station, disposal facility, or right-of-way of litter.

C. All transfer stations within the County used for the transfer of solid waste from its source to a transportation vehicle or from a transportation vehicle to another transportation vehicle, shall be fully enclosed facilities, with concrete flooring, with drainage facilities to a sanitary sewer, and shall be hosed down with water and disinfectant at least once every 12 hours during use or after each use, whichever is less frequent.

D. Each operator of a solid waste facility in the County must at all times maintain a current listing of solid waste contributors including the names, addresses, and telephone numbers of persons under contractual agreement to deposit solid waste in the facility; persons dumping or depositing waste in the facility on a call basis; persons transporting waste to the facility both from outside of the County and from within the County; and any indirect contributors of waste amounting to more than one ton per dumped or deposited load of waste. Said information shall be available to the County upon request by its Board of Supervisors or its designee, including the County Board of Health.

E. The operator of a disposal facility shall be directly responsible for requiring compliance by all transporters and transferors or of solid waste of the provisions of this Section #5; and the

operator shall be jointly and severally responsible for any violations of this Section.

SECTION #6: HAZARDOUS WASTE

A. "Hazardous Substance" means a hazardous substance as defined in Iowa Code Section 455B.411(3).

B. "Hazardous Waste" means a waste or combination of wastes as defined in Iowa Code Section 455.411(4).

C. It shall be unlawful for any hazardous substance or hazardous waste to be transported to a disposal facility or dumped or deposited in such a facility in the County. The operator of a disposal facility and any person transporting any hazardous substance or hazardous waste as hereinabove prohibited shall be jointly and severally responsible for the violation of this provision.

D. The operator of a disposal facility shall have an affirmative duty and responsibility to monitor through its contracts and other forms of acceptance of solid waste and through routine physical checking of each load of waste for the transportation and/or dumping and depositing of hazardous substances and hazardous wastes.

E. Upon the reasonable suspicion or discovery of the transportation or dumping and depositing of hazardous substances or hazardous wastes by any person working in the transportation, dumping and depositing, or other operation of a transfer station or disposal facility, the person

acquiring the reasonable suspicion or discovery of violation of this Section #6 shall immediately notify in writing the County Board of Supervisors specifying the nature of the reasonable suspicion; the identity of other persons with knowledge of the situation; the identity of the hazardous substance or hazardous waste, if known; the exact date and location of the violation and the present location of the suspected or discovered hazardous substance or hazardous waste.

F. The County Board of Supervisors or its designee, including the County Board of Health shall have authority to immediately impound or otherwise secure and seize any transportation vehicle or other containing conveyance or facility which, through reasonable investigation, is reasonably suspected to or does contain a hazardous substance or hazardous waste.

SECTION #7: VIOLATIONS BY OPERATORS

A. A violation by a disposal facility operator of any Law including this Ordinance relating to creation, use, operation, maintenance, monitoring, closure, or post closure maintenance and monitoring of a disposal facility, including responsibilities for transfer and transportation of solid waste, shall result in immediate revocation of the permit which may be issued pursuant to Section #4 hereof.

B. In addition to any other penalty provided herein or by Law, a violation by the operator of any

provision of this Ordinance shall be a County Infraction and subject to a civil penalty not to exceed $100.00 per violation, or if the infraction is a repeat offense, a civil penalty not to exceed $200.00 for each, repeat offense.

SECTION #8: VIOLATIONS BY OTHER PERSONS

Any person, including but not limited to, persons employed in the transfer and transportation of solid waste within the County who violate any provision of this ordinance shall commit a County Infraction and shall be subject to a civil penalty not to exceed $100.00 for each violation, and if the infraction is a repeat offense, a civil penalty not to exceed $200.00 for each, repeat offense.

SECTION #9: EFFECTIVE DATE

This Ordinance becomes effective on the date published as provided in Iowa Code Section 331.302(7); however, any disposal facility which has accepted the dumping and depositing of solid waste at its location of operation prior to the date this ordinance becomes effective, is expressly exempted from the requirements established herein.

SECTION #10: ESTABLISHMENT OF LANDFILL PROTECTION FUND

The County shall use all permit fees and civil penalty fees collected under this Ordinance to create and maintain a Landfill Protection Fund, held separate from all other County funds, which shall be used by the County Board of Supervisors to provide such services, improvements, or other reasonable and necessary benefits to persons in the County as are reasonably necessary to protect

persons in the County from adverse effects of landfill operations within the County.

SECTION #11: SEVERABILITY

If any provision of this Ordinance becomes ineffective, void, or voidable by operation of statute, rule, Court order, or otherwise, all provisions and Sections shall remain in full force and effect and shall be unaffected thereby.

FIRST AMENDMENT TO ORDINANCE #4

AN AMENDMENT TO MONROE COUNTY ORDINANCE #4, SECTION #4(B)(4)(a), SECTION #2, and SECTION #10 AND ADDING A NEW SECTION #11, FOR THE PURPOSE OF ADAPTING THE SAID ORDINANCE #4 TO THE PROVISIONS OF SENATE FILE 2250, SECTION 6 OF THE ACTS OF THE 72nd GENERAL ASSEMBLY (1988), and to clarify the provisions of ordinance #4.

SECTION #1

Ordinance #4, Section #4(B)(4)(a) is hereby deleted and the following is substituted therefor:

a. The operator shall document in writing and pay a tonnage fee for each ton of solid waste deposited (measured as required in Iowa Administrative Code Section 567 – 109.4 (455B)(2) in excess of 25 tons per day, an amount equal to the following, which shall be a tonnage fee assessed and payable in addition to any tonnage fee required by a State regulative body:

1. For the year beginning July 1, 1988 through June 30, 1989: $1.50 per ton;

2. For the year beginning July 1, 1989 through June 30, 1990: $2.00 per ton;

3. For the year beginning July 1, 1990 through June 30, 1991: $2.50 per ton;

4. For the year beginning July 1, 1991 through June 30, 1992: $3.00 per ton; and

5. For the year beginning July 1, 1992 and all subsequent years: $3.50 per ton.

The tonnage fee assessed under this Section 4(B)(4) shall be held separate from all other County funds and shall be used by the County exclusively for the development and implementation of alternatives to sanitary landfills or for the costs incurred by the County to abate problems associated with the operation of the respective sanitary landfill.

SECTION #2

Ordinance #4, Section #2 (DEFINITIONS) is hereby amended to add an additional subsection G, as follows:

G. "Solid Waste" means those substances described and defined in Iowa Code Section 455B.301(5).

The purpose of this amendment is to define the term "solid waste" as used in Ordinance #4 and all amendments thereto.

SECTION #3

Ordinance #4, Section #10 is hereby amended to add the following, additional paragraph:

However, all tonnage fees assessed pursuant to Section #4(B)(4)(a) shall be used by the County exclusively for the development and implementation of alternatives to sanitary landfills or for

the costs incurred by the County to abate problems associated with the operation of the sanitary landfill.

The purpose of this amendment is to implement the provisions of House File 2250, Section 6 of the Acts of the 72nd General Assembly, 1988.

SECTION #4

Ordinance #4 is amended to add, an additional Section as Section #11 and renumber the existing Section #11 as Section #12, as follows:

(New) SECTION #11: UNPERMITTED LANDFILLS

Any disposal facility which is operating in the County without a County permit as required by this Ordinance is a nuisance and shall be abated according to law.

(renumbered) SECTION #12: SEVERABILITY

The provisions of a former Section #11: SEVERABILITY are hereby renumbered as Section #12.

Star 14 Chronology
(As of 8/31/88)

4/22/86 Drilled first holes on dirt road on Star 14

5/15/86 Optioned Charles Scott and Ollie Kaldenberg land

5/30/86 Signed coal leases w/Charles Scott and Ollie Kaldenberg

8/14/86 Optioned Melvin Bain farm to add to Star 14

8/17/86 Put in first monitoring wells on Star 14 and established Star 14 stream stations

11/86 Louis Berger & Associates conducted an Archaeological Survey of Star 14

9/10/86 Finished initial drilling on Star 14

11/8/86 Signed coal lease w/Melvin Bain

12/13/86 Started writing Star 14 coal permit

2/87 Hickok wrote PHC for Star 14

4/17/87 Submitted Star 14 coal permit

6/3/87 Asked for Board approval to mine thru the dirt Road on Star 14. Board granted the request after Star provided a letter on agreeing to do all road maintenance.

7/1/87 Discussion w/Chuck McCarty, Char. Valley R C & D suggested landfill idea – (Solid waste as well as ash)

8/15/87 Signed landfill amendments w/OK, CS, MB

8/18/87 Six-County (Monroe, Mahaske, Marion, Lucas, Jasper & Poweshiek) meeting in Knoxville – first solid waste meeting for Star

8/20/87 Article in Albia paper

8/30/87 Article in DSM Register

9/8/87 Meeting w/Bd of supervisors about Star 14 and what we are up to – with our landfill proposal

9/9/87 Road hearing by DSC for Star 14-Billy Myers, Supervisor, voiced his opposition.

9/11/87 First Reading of Ordinance #4

9/14/87 Grinnell public hearing on 6 Countys proposal – entire board of Supervisors was present-Annette led a vicious attack – 100 people present – 1 busload up from Albia

9/15/87 2nd Reading of Ordinance # 4

9/17/87 3rd Reading of Ordinance # 4

9/17/87 Sent Star 6 copies to County Supervisors

9/17/87 Landfill Ordinance # 4 adopted by the Board of Supervisors

9/24/87 Janet Jenkins Letter to the Editor – Landfill commissioner – Albia paper

10/1/87 6 County meeting in Newton – Again Bd. of Supervisors showed – voiced their anger & tried to disrupt the meeting

10/20/87 Al Heuton hired to prepare a zoning ordinance for Monroe County

10/22/87 Ray Vance Article Albia paper, asserting zoning is the only way to stop the landfill

11/2/87 Randy Luwe started writing the Star 14 SLF permit

11/12/87 Burton Kross hired to review the landfill proposal Jim Huyser met w/the Board

12/4/87 Contracted with Louis Berger & Associates to conduct Phase II Archaeological survey for Star 14

1/4/88 Star 14 hearing in Albia – Pete Hamlin and Jim Huyser speakers – man from ISU spoke on zoning

1/15/88 Board voted to request DNR hold a public hearing on Star 14. Sent letter to Lary Wilson of the DNR

1/19/88 Submitted Star 14 to DNR

1/28/88 Zoning Commission members named by the Board of Supervisors

2/18/88 DSC Asst. Director Ken Tow had meeting with the Board of Supervisors over their request for all Star violation notices.

2/19/88 8:30 am-Board rescinded previous approval to mine thru the dirt road on Star 14. First approved 6/3/87

2/25/88 Burton Kross visited Star for 30 minutes at the office

3/2/88 County Zoning Commission voted landfills into I-2 status from A-2

3/21/88	Bd of Supervisors letter to DNR & DSC (Burton Kross Report)
3/25/88	Janet Jenkins Editorial
4/4/88	Zoning Meeting – Bd. of Supervisors appeared
4/7/88	Zoning commission meeting – Legion Hall-Albia, 9 AM presented proposal
4/11/88	2nd letter by Board to DSC, condemning the project
4/12/88	Greg Morehead, Chairman, Zoning Commission resigned from Commission
4/14/88	Zoning Comm. Meeting – Albia- 10AM City Hall Presented first proposal at 9am to Board of Supervisors
4/21/88	Zoning Commission meeting to adopt final report to the Board-Star presented proposal requesting re-zoning of all Star permits, leases, washplant, etc. Commission didn't act on it,
4/25/88	Second proposal to the Bd. of Supervisors
4/28/88	3rd letter by Board to DSC, condemning the project
4/28/88	Albia paper editorial
4/29/88	1st reading of the Zoning Ordinance by the Board
5/2/88	2nd Reading of the zoning ordinance by the Board
5/6/88	In court w/Monroe County & DNR-Injunction hearing

5/6/88 Received Star 14 Coal Permit – Dan & Randy put up Star 14 signs

5/7/88 Tom DeLong, subcontractor, started clearing in the coal operation

5/9/88 9am-Public hearing of the Zoning Ordinance, Jim made announcement of shutdown

1pm-3rd & final reading of the zoning ordinance

7pm-DNR meeting, Legion Hall, Albia, Pete Hamlin, Ruth Bender, Morris Preston there

5/10/88 Zoning Ordinance went into effect – Jim Huyser & Randy went to DNR to ask for permit from Larry Wilson & Al Stokes – struck out

5/13/88 Star 14 SLF permit approved by DNR

5/13/88 First layoffs by Star-Affected over 20 employees

5/25/88 An informal conference on the Star 14 Revision was held by the DSC at the request of the Board. The Board voiced their opposition to Star 14 thru Janet Jenkins and the Burton Kross report.

5/26/88 Meeting and proposal to the County

6/9/88 Meeting w/Bd of Supervisors-presented 3rd proposal

6/20/88 Laid off remaining mining crew-reclamation crew left

6/21/88 Talked to the Zoning Administrator about information requirements – brought up transportation study

6/22/88 Letter form Zoning Administrator
Received Star 14 coal revision letter from DSC

6/29/88 Star 14 Coal revision letter from DSC

6/29/88 The Board passed a revision to Landfill ordinance #4

7/8/88 Met w/ the Bd & updated them on our project

7/8/88 Laid off remaining employees except for a staff of 7

7/13/88 Tried to drop off the re-zoning permit but office was closed until 7/1/88 [sic] for Administrator's vacation

7/18/88 9:03am Margaret Stewart (zoning administrator) called to schedule a time for Randy Luwe to submit the re-zoning application-scheduled Randy for 7/22/88 at 8am

7/22/88 Submitted the Star 14 re-zoning application to Margaret Stewart-2:28.09 minutes to review submitted – walked downstairs, made out a receipt and made a copy – finished w/Margaret in 7:31.47 minutes

7/30/88 Jim Huyser met w/ the Governor over the situation at Star 14

8/9/88 First meeting by Zoning Commission discussing Star 14 app. – scheduled a site visit on

8/25/88 & approved rules of conduct for the Zoning Commission

8/10/88 RSL letter to Zoning Commission requesting info presented at the meeting of 8/9/88.

8/11/88 Letter from Zoning Commissioner charging me for copies and scheduling a meeting for me to come in & pick them up on 8/15. RSL didn't attend the scheduled meeting.

8/18/88 Letter from Zoning Commissioner, providing some of the requested information free of charge

8/25/88 Site visit w/Zoning Commission on Star 14 at 8a.m. – Met for 1 1/2 hours.

AMENDMENT TO LEASE

7/28/87 RSL

Mr. and Mrs. Charles Scott
R.R. #5
Albia, Iowa

and

James Huyser

1) Lessor grants Lessee the right under this lease to dispose of non-hazardous waste on the leased premises.

2) Disposal of waste will be conducted by the Lessee in accordance with permits applied for and received from the Department of Agriculture and the Department of Natural Resources.

3) A royalty of $.20 per ton will be paid by the Lessor to the Lessee on the 25th of each month for the preceding month, for each ton of material disposed of under the permit from the Department of Natural Resources. The minimum royalty will amount to $500.00 per month.

4) Records of disposed tonnage will be kept and will be available to the Lessor at any reasonable for inspection.

5) All insurance required under the original lease will remain in force and effect until all activity ceases on the leased premises.

6) Disposal on the leased premises will cease 9 months after all the economically mined coal has been removed.

8) Effective date, August 15, 1987.

/s/ Rose Mary Scott

/s/ Charles Scott
Lessor

/s/ James Huyser
Lessee

STATE OF IOWA, COUNTY OF MONROE.

ON THIS 28th day of July, 1987, before me personally appeared Mr. & Mrs. Charles Scott, James Huyser to be known to be the person(s) described in and who executed the same as his (their) free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

My Commission Expires:

_____ /s/ Randall S. Luwe
Notary Public within and for the County and State

(Seal)
RANDALL S. LUWE
MY COMMISSION EXPIRES
2/15/90

App. 24

AMENDMENT TO LEASE

7/28/87 RL

Mr. and Mrs. Oliver Kaldenberg
R.R. #5
Albia, Iowa

and

James Huyser

1) Lessor grants Lessee the right under this lease to dispose of non-hazardous waste on the leased premises.

2) Disposal of waste will be conducted by the Lessee in accordance with permits applied for and received from the Department of Agriculture and the Department of Natural Resources.

3) A royalty of $.20 per ton will be paid by the Lessor to the Lessee on the 25th of each month for the preceding month, for each ton of material disposed of under the permit from the Department of Natural Resources. The minimum royalty will amount to $500.00 per month.

4) Records of disposed tonnage will be kept and will be available to the Lessor at any reasonable for inspection.

5) All insurance required under the original lease will remain in force and effect until all activity ceases on the leased premises.

6) Disposal on the leased premises will cease 9 months after all the economically mined coal has been removed.

8) Effective date, August 15, 1987.

/s/ Oliver Kaldenberg

/s/ Dorothy Kaldenberg
Lessor

/s/ James Huyser
Lessee

STATE OF IOWA, COUNTY OF MONROE.

ON THIS 28th day of July, 1987, before me personally appeared Mr. & Mrs. Oliver Kaldenberg, James Huyser to be known to be the person(s) described in and who executed the same as his (their) free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

My Commission Expires:

_____

/s/ Randall S. Luwe
Notary Public within and for the County and State

(Seal)
RANDALL S. LUWE
MY COMMISSION EXPIRES
2/15/90

AMENDMENT TO LEASE

Mr. Melvin Bain
R.R. #5
Albia, Iowa

and

James Huyser

1) Lessor grants Lessee the right under this lease to dispose of non-hazardous waste on the leased premises.

2) Disposal of waste will be conducted by the Lessee in accordance with permits applied for and received from the Department of Agriculture and the Department of Natural Resources.

3) A royalty of $.20 per ton will be paid by the Lessor to the Lessee on the 25th of each month for the preceding month, for each ton of material disposed of under the permit from the Department of Natural Resources. The minimum royalty will amount to $500.00 per month.

4) Records of disposed tonnage will be kept and will be available to the Lessor at any reasonable for inspection.

5) All insurance required under the original lease will remain in force and effect until all activity ceases on the leased premises.

6) Disposal on the leased premises will cease 9 months after all the economically mined coal has been removed.

7) The Lessee has a purchase option on the leased property for double the current market price. Current market price is defined as the marketable price for the land on the date this option is exercised.

8) Effective date, August 15, 1987.

/s/ James Huyser
Lessor

/s/ Melvin T Bain
Lessee

STATE OF IOWA, COUNTY OF MONROE.

ON THIS 21th day of July, 1987, before me personally appeared Melvin Bain, James Huyser to be known to be the person(s) described in and who executed the same as his (their) free act and deed.

iN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

My Commission Expires:

_____ /s/ Randall S. Luwe
Notary Public within and for the County and State

(Seal)
RANDALL S. LUWE
MY COMMISSION EXPIRES
2/15/90

IOWA DEPARTMENT OF NATURAL RESOURCES
SANITARY DISPOSAL PROJECT PERMIT

I. Permit Number: 68-SDP-5-88P

II. Permitted Agency: Star Coal

III. Project Location: W 1/2 of the NW 1/4 SECTION 23; S 1/2 of the NE 1/4 and S 1/2 of the NE 1/4 SECTION 22; W 1/2 of the SE 1/4 and E 1/2 of the SW 1/4 SECTION 22; all in T73N-R17W Monroe County

IV. Responsible Official: James Huyser, President

Name: Star Coal Company
Address: RR #1, P.O. Box 127
Lovilia, IA 50150
Phone: 515/946-7221

V. Registered Design Engineer: Rodney J. Vlieger
Name: Eugene A. Hickok, Associates
Address: 10550 New York Avenue – Suite C
Des Moines, IA 50322
Phone: 515/253-0830

VI. Date Issued: May 13, 1988

VII. Expiration Date: May 13, 1991

VIII. Issued by: /s/ Illegible
Environmental Protection Division
for the Director

IX. General Provisions

The above named permitted agency is hereby authorized to operate a sanitary landfill at the

described location in conformance with Chapter 455B of the Code, the rules pursuant thereto existing the time of issuance, and any subsequent new rules which may be dully [sic] adopted and any provisions contained in Section X of this permit.

The project shall be operated according to the engineering plans and specifications approved by the Department of Natural Resources and these shall become a part of this permit. Any modifications or deviations from the engineering plans and specifications must have prior approval by the Department and an amendment to this permit issued.

The issuance of this permit in no way relieves the applicant of the responsibility for complying with all other local, state, and federal statutes, ordinances, and rules or other requirements applicable to the establishment and operation of this landfill.

No legal or financial responsibility arising from the construction or operation of the approved project shall attach to the state of Iowa or the Department of Natural Resources due to this issuance of this permit.

If title to this project is transferred, the new owner must apply to the Department for a transfer or this permit within thirty days of the date of title transfer. This permit is void sixty days after the date of title transfer unless the Department has transferred the permit.

Note: Failure to comply with Chapter 455B of the Code, or any rule or order promulgated pursuant thereto, or any or all provisions of this permit may result in 1) a monetary civil penalty for each day of violation, pursuant to section 455B.307 of the Code, or 2)

the suspension or revocation of this permit, pursuant to Section 455B.304 of the Code.

X. Special Provisions:

1. Waste disposal at this site shall be limited to municipal solid waste and coal combustion residue. The source of these wastes shall be as identified in the comprehensive plan and includes the counties of Jasper, Mahaska, Marion, Poweshiek, Lucas, and Monroe. Additionally, the adjacent potential area referenced by Larry E. Crane in his April 29, 1988 letter to Allan E. Stokes, which includes Des Moines Metro Solid Waste Agency (Polk), Warren, Madison, Union, Clarke, Wayne, Ringgold, Decatur, Marshall, Wapello, Appanoose, Iowa, Tama, and Grundy counties, shall be considered to be the balance of the 20 county service area referenced on page 4 of the permit application. Any contractual agreement for disposal of solid waste, other than coal combustion residue, for areas outside of the geographic area defined herein shall be considered to be outside of the scope of the approved plan and subject to the approval of a revised comprehensive plan and subsequent permit amendment.

2. Following the removal of the coal seam and prior to placement of solid waste, the responsible official's engineer shall inspect and certify that base preparation, including the leachate collection system, conforms to the plans approved as a part of this permit application.

   This department must be notified a week in advance of the engineer's inspection so that

the department may also conduct an inspection.

3. This facility shall be operated in accordance with the construction plans and permit application documents, to include the comprehensive solid waste plan and appendices, all of which are herewith incorporated into the permit by reference.

4. A planning board consisting of representative of each entity that contracts with Star Coal Co., for the disposal of solid waste, appointed to implement the waste management alternative in the Comprehensive Solid Waste Plan, shall be assembled between July, 1988 and September, 1988.

5. Revised Comprehensive Plans shall be initiated for all areas under contract with Star Coal Co., by August 1, 1988, and shall be completed and submitted to the department by January 1, 1989. Continued comprehensive planning will be completed each July 1 and January 1 for new service areas added under contract.

6. No open burning shall be authorized at this site.

7. In-situ testing of the clay liners along the sidewalls of the site will be completed as the liner is constructed. An independent consultant shall conduct in-situ permeability tests to verify that the degree of compaction achieved within the liner is greater than 95% of the proctor density. Verification shall be by testing in each five foot vertical interval and 500 foot horizontal interval around the entire perimeter of the site.

8. Solid wastes disposed at this site shall not exhibit free liquids, toxic, or hazardous properties. No hazardous wastes as defined by Chapter 455B.411 of the Iowa Code may be disposed at this landfill. Any wastes other than municipal solid waste which may potentially exhibit such characteristics shall be accepted for disposal only under the provisions of a special waste authorization issued by the department. Special waste authorization must be obtained in advance of acceptance of the waste. Semiannual reports summarizing the disposals for the reporting period shall be submitted for all specially authorized wastes received. The reporting periods shall be January 1 through June 30 and July 1 through December 31 with reports due July 31 and January 31 each year. The reports shall include identification of the wastes and volumes authorized, the waste generator, the period of disposal and copies of the disposal records. If an authorized waste is not received, a statement to that effect shall be included in the semiannual special wastes reports. Copies of this report shall be sent to the Field and Main Offices of the department.

9. All groundwater monitoring wells shown on the approved plans shall be installed in the initial construction phase for the entire site prior to disposal of solid waste. After the wells are developed, water samples shall be collected and analyzed for the parameters and the frequencies indicated hereafter:

Quarterly: (first year only)

Arsenic, dissolved
Benzene

Barium, dissolved
Carbon Tetrachloride
Cadmium, dissolved
1,2-Dichloroethane
Chromium, total dissolved
Trichloroethylene
Lead, dissolved
1,1,1-Trichloroethane
Mercury, dissolved
1,1-Dichloroethylene
Magnesium, dissolved
Paradichlorobenzene
Zinc, dissolved
Copper

Quarterly: (first year and continuing)

Chloride
Specific Conductance (field measurement)
pH (field measurement)
Ammonia nitrogen
Iron, dissolved
Chemical Oxygen Demand
Temperature (field measurement)
Annual: (first year and continuing)

Total Organic Halogens
Phenols
One hundred twenty (120) days following the effective date of the proposed ground water monitoring rules, the responsible officials shall have the existing monitoring well system analyzed to determine the adequacy of the system in accordance with the new rules. In particular, a hydrologic monitoring system plan shall be submitted to the Department

detailing the sampling protocol to be followed, and other details as may be required by the rule as adopted.

10. Within 180 days after the effective date of administrative rules intended to implement Chapter 455B (Iowa code) as amended by HF631, Acts of the 1987 Iowa General Assembly, the responsible official(s) shall submit the following documents to the department for review:

    a. A closure/postclosure plan as outlined in Section 455B.306 (Iowa Code) as amended by HF 631, Section 413.4.a.

    b. A leachate control plan as outlined in Section 455B.305 as amended by HF 631, Section 413.4.b. The plan must address the adequacy of the system as proposed relative to such subsequent rules, especially in regard to treatment and disposal options.

    c. A copy of the financial assurance instruments put in place by the owner/operator to assure that the operation will continue to be viable during the active life of the facility as well as the thirty-year postclosure period.

11. The responsible officials shall provide the department a copy of a lease or access document, recorded at the county recorder's office which guarantees access to the site for thirty years after closure of the site for the purposes of site surface maintenance and ground water monitoring. The document shall specifically indicate that access to the site for thirty years after closure is permitted for these purposes.

A signed and legally binding lease must be submitted to the department prior to the commencement of the deposition of any solid waste.

12. The site and operation of this facility shall be inspected semiannually by a professional engineer registered in the State of Iowa. A brief report by the engineer indicating areas of conformance and/or nonconformance with the approved plans and specifications shall be submitted to both the Field and Main offices of this department by May 1 and November 1 of each year.

13. This sanitary landfill is authorized to accept asbestos waste. This Special Provision should not be interpreted as requiring the landfill to accept asbestos wastes.

    The following conditions and requirements shall be met by the sanitary landfill operator and/or the certified asbestos contractor whenever asbestos waste is disposed in this sanitary landfill:

    a. Prior to delivery, the asbestos and any asbestos contaminated wastes shall be wetted and placed into a container system which will prevent it from becoming airborne. The exception is cardboard boxes which have contained asbestos parts.

    b. If the asbestos wastes become dry prior to disposal, rewettting will be necessary to prevent dust evolution. (Asbestos is carcinogenic if inhaled.) This must be done prior to acceptance at the landfill. When exposed, the wet asbestos must be properly covered before it can dry again.

c. Respirators and goggles shall be used in all instances of asbestos handling operations when dust evolution is unavoidable or when wetting operations are not effective in controlling dust evolution.

d. The hauler shall identify the waste to the landfill operator upon arrival at the sanitary landfill.

e. Containers of asbestos shall be deposited at a working face separate from the regular working face, covered and compacted taking extreme care not to rupture asbestos containers.

f. Strict adherence to EPA regulations is mandatory. Questions on EPA regulations should be addressed to Ms. Jan Lambert at 319/236-2896. Questions regarding asbestos abatement certification should be addressed to Walter Johnson, Iowa Division of Labor, 515/281-3606.

14. All solid wastes shall be covered with compacted clay overburden soils at the end of the working day to a minimum depth of six inches. Intermediate cover shall be placed at the end of each week's operation for a total depth of cover of 12 inches. All surfaces upon which solid waste has not been placed for a period of two months shall be covered with an additional foot of clay to provide a final cover of depth of two feet above the solid waste.

15. This facility shall be staked as necessary and inspected on a semiannual basis by a professional engineer registered in the State of Iowa. The engineer shall prepare a brief report

describing the site's conformance and nonconformance with the permit and approved plans and specifications during the inspections. These reports shall be submitted by May 1 and November 1 each year, and shall be submitted to both the Field and Main offices of the department. The department shall be notified if any inspection reveals any nonconformance with the permit and approved plans and specifications.

16. The owner of this landfill shall restore the completed landfill area surface to the approximate original contour consistent with provisions in the mining permit and our rules.

17. This permit may not be transferred, or assigned without the written approval of the department.

18. The issuance of this permit does not convey any property rights of any kind, or any exclusive privilege.

19. The issuance of this permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of state or local law or regulations.